

Public Health Emergency Law

CDC Foundational Course for Front-line Practitioners

Developed by

U.S. Centers for Disease Control and Prevention



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Public Health Emergency Law

- Unit 1: Course Introduction and Basic Concepts
- Unit 2: Legal Issues: Detecting and Declaring Emergencies
- Unit 3: Emergency Powers I: Protection of People
- **Unit 4: Emergency Powers II: Management of Property**
- Unit 5: Emergency Powers III: Mobilizing Professional Resources
- Unit 6: Advanced Issues Seminar



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Unit 4 **Emergency Powers II:** **Management of Property**



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Disclaimer

These course materials are for instructional use only and are not intended as a substitute for professional legal or other advice. While every effort has been made to verify the accuracy of these materials, legal authorities and requirements may vary from jurisdiction to jurisdiction. Always seek the advice of an attorney or other qualified professional with any questions you may have regarding a legal matter.



Unit 4 Objectives

By the end of this unit, participants will be able to:

1. Identify legal options available to manage contaminated private property in emergencies
2. Identify legal options available to use private facilities in emergencies
3. Understand key legal issues regarding control of supplies and equipment



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Instructor: *this is an essential slide, as the objectives frame the order of content included in this unit.*

Objectives for this unit:

- Identify options available for using private facilities in an emergency
- Understanding the Government's responsibilities when it takes control

Hypothetical Example (Cont.)

Property Issues . . .

- A building is identified as probable initial source of disease
- Elsewhere, food or drugs found contaminated
- 20,000 patients need hospital care; 1,000 need ventilators – none in stock
- Adequate pharmaceuticals available for confirmed cases; the “worried well” demand access



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The bullets are examples of the kind of property needs that might develop in a public health emergency event; they are not necessarily time sequenced.

Objective 4.1

Identify Legal Options Available to Manage Private Property in Emergencies



Perspective

This can be a sensitive topic:

Obtaining consent for managing the use of property is almost always superior to exercise of extraordinary emergency powers over property

Even *discussion* about government's taking of property can be sensitive when there is *no* current emergency



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- Consent is always better – It is always better to ask
 - Exercising powers should be limited to those cases when consent cannot be obtained
- For states, procedures are dependent upon whether the Governor has invoked special emergency powers or whether the health department is acting on its own standard powers—generally, the health department can close a business or institution until the public health investigation is concluded and the problem is resolved—often the closure happens voluntarily, or sometimes the business or institution asks the health department to issue a public health order to close it

Advantages of Consent: Management of Property

- Principle: *Our nation is built on respect for private management of property*
 - Seizure of property is controversial and reserved for cases of true need
- Management:
 - The more complex the facility or distribution, the more difficult is operation without active cooperation of private managers
- Leverage Social Cohesion:
 - Cooperation is critical in emergencies
 - Volunteers want to help & social cohesion increases



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As we saw in Unit 3, the lessons from the SARS experience in Toronto demonstrate that people are very willing to cooperate with even the most drastic measures if they understand how it helps/protects themselves and/or their community.

Property Measures: Legal Dichotomy Access Control vs. Use

- Property management considerations relevant to public health emergencies in two basic ways:
 - **Access Control**: Government may need to close, confiscate, deny access to, evacuate people from, prevent sale or use of real or personal property because unsafe, or for police activity
 - **Use**: Government may need to use private property in order to respond to emergency
- The law treats **access control** measures to protect public health and safety very differently than **use** measures



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• Access Control: Government may need to close, confiscate, deny access to, evacuate people from, prevent sale or use of real or personal property because it is unsafe, or for police activity. Access control covers:

- Contaminated structures/areas/foods/drugs
- Crime scenes – sites under active investigation

• Use: Government may need to use private property in order to respond to an emergency. Use covers:

- Real property: clinics, hospital facilities, shelters
- Personal Property: medical equipment, drugs, foods, vehicles (supply trucks)

Property Measures: Legal Tension

- **Access Control:** Government is empowered under police power doctrine to regulate use of private property to protect public from unsafe conditions
- **Use:** Government must pay for the property that it uses for a public purpose

U.S. Constitution, 5th Amendment:

“...nor shall private property be taken for public use, without just compensation”



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•There can be situations in which it becomes more difficult to determine whether a government regulation is required to protect the public health and safety, or is being imposed to require that private property be used for a public purpose. The courts have not been able to draw a clear distinction.

Example: Local government restricting development of property in a coastal area for environmental purposes was held by the U.S. Supreme Court as a “use” of property for which government must pay compensation. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). By contrast, flood plain management regulations to protect property from the risk of flooding have been upheld. *Texas Landowners Rights Ass’n v. Harris*, 453 F. Supp. 1025 (D.D.C. 1978), aff’d mem. 598 F.2d 311 (D.C.Cir. 1979), cert. denied sub nom., *Texas Landowners Rights Ass’n v. Director, FEMA*, 444 U.S. 927 (1979).

•U.S. Constitution, 5th Amendment: “*nor shall private property be taken for public use, without just compensation*”

•Makes 2 key points:

- The literal- cannot take private property for public use without paying a just amount for it
- The implied assumption that is the basis for eminent domain: the government MAY take private property for public use, IF there is just compensation
- That said, **it is always** better to acquire this property with permission than to take by eminent domain.

Reminder: Using National Response Plan

- In major events, coordination of response may be organized by National Response Plan (NRP)
 - Where state and local capabilities need additional Federal support
 - State and Federal government join forces in the Joint Field Office (JFO)
 - Resources available under powers of ANY federal agency are coordinated through the JFO
- Where local, state and federal governments each have powers to take action...
 - Incident commanders in coordinated response can select powers to implement



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•This may be a good opportunity to explore how the Joint Field Offices (JFOs) actually work. The course discussed this briefly in Unit 1, but can here focus on how local or state health officials could work through the Emergency Support Functions (ESF) contact to request resources and identify ways to get them

•Please note that the JFO was formerly known as a Disaster Field Office (DFO) under the old Federal Response Plan (FRP) that preceded the National Response Plan (NRP).

•Emergency Support Functions (ESF): The Federal Response Plan (FRP) details 12 ESFs to coordinate operations during federal involvement in an incident; transportation, communications, public works, engineering, firefighting, information and planning, mass care, resource support, health and medical services, urban search and rescue, hazardous materials, food, and energy are all considered.

Management of Property: Closing Facilities

The state or local health department can close a facility or impound contaminated property by:

- Issuing administrative public health orders
 - To close restaurants for unsanitary conditions
- Using general legal powers to control epidemics or determination that there is a public nuisance
 - Same powers used to condemn a property as unsafe after fire, earthquake, storm damage

Until the public health investigation is concluded and the problem or exposure is resolved



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Each state has its own system for issuing health or environmental closure orders – but every state has and utilizes these powers.

- It is not normally required that a public health emergency be declared before issuing an administrative health order to close unsafe facilities. The police power which allows a state to close a crime scene or a tank truck accident site with yellow tape is the same power which allows police or health authorities to close a restaurant due to unsafe health conditions. How this police power is delegated to health authorities is a matter of specific state law.
- Closure orders can be effective immediately, but a government must provide the owner with notice and an opportunity for a hearing.
- The Draft Model State Emergency Health Powers Act recommends that each state ensure that it has provisions that allow closure or decontamination of facilities that are dangerous to public health when a public health emergency is declared. This did not intend to suggest that public health authorities did not have closure powers in the absence of a public health emergency.
- Even where there is a clear need to close a whole facility, or remove unsafe goods from store shelves, it will normally be faster and easier to request voluntary closure or voluntary removal of items for sale. The business or institution may ask the health department to issue an administrative order to close for its own protection.

Temporary Closure of Facilities: Police Power Doctrine

In addition to “public health” powers, state and local law enforcement can require temporary closure of facilities:

- As unsafe, for as long as the facility may endanger the public
- For purposes of criminal investigation



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- Even when public health closes a facility, it is usually the police who enforce such closures
- When the police and public health both want to close the same facility:
 - If police need to investigate a scene closed by public health they need to do so in consultation with public health
 - If public health needs to investigate a scene closed by police, they need to do so in consultation with police.
 - If there is a dispute, the Incident Commander may need to decide precedence in consultation with public health and police commanders on scene.
- For states, procedures are dependent upon whether the Governor has invoked special emergency powers or whether the health department is acting on its own standard powers—generally, the health department can close a business or institution until the public health investigation is concluded and the problem is resolved—often the closure happens voluntarily, or sometimes the business or institution asks the health department to issue a public health order to close it
- **Note:** Other agencies, such as fire departments, hazardous materials response units and environmental management agencies have these same police powers.
- In March of 2005, a Department of Defense office complex in Fairfax County, VA was closed due to a suspected anthrax attack.
 - The HazMat unit of the Fairfax County Fire Department ordered the closure.

Temporary Closure of Facilities: Property Rights Under Police Powers

- Compensation is generally **not** provided to close property under police power
- Owner can challenge the closing in court
 - Damages to property owner could be awarded if the closing is shown to be unjustifiable



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Instructor's Note, State/Local Laws: *Please add state/local specifics when designing a state/local course. This slide is a general discussion of law based on constitutional 'takings' cases – instructor may modify to reflect law in a particular state.*

- Prosser on Torts – states general proposition that compensation is not provided for action taken under police power to protect the public
- Draft Model State Emergency Health Powers Act (MSEHPA):
 - Suggests standard should be reasonable cause to believe the facilities or materials will endanger the public health. State laws may differ.
 - Suggests that before property is actually destroyed, government should 'institute appropriate civil proceedings' (Section 507). This would help protect the government from damages should its destruction of property later be challenged.
 - Police closure is an Access Control issue, not a Use issue
 - Therefore, police are not required to compensate the owner for the closure

Management of Private Property: Closing Part of A Facility

Closure or condemnation may be for only part of the business or facility's operations or supplies

- *Public health is required to monitor the facility for safe operations during the public health order*



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Example: Monitoring the facility for safe operations during the public health order, such as closing a hospital ICU and assuring safe operations in the rest of the hospital

- Even a partial closure would displace patients or clients.
- Such an order may be needed to ensure patient/client care while the public health order is in effect

Reopening a Facility Closed for Public Health Purposes

- Agency that issued the closure order:
 - Determines the facility no longer poses a threat to public health and determines the situation is “safe” or “acceptable”
 - Issues an administrative order rescinding the closure order
- Note: multiple agencies may have role
 - U.S. or State EPA in case of certain contaminants
 - Responsibility for decontamination?



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- Reopening facility: if facility was closed for law enforcement reason (I.e., a crime scene) and not as a public health protective measure, then when FBI/ police closure ends, owner has freedom to reopen unless another 'closure' happens (e.g. health closure)—a public health closure would occur if there is an ongoing exposure posing threat to public health
- Is there a difference as to which law enforcement agency (federal/state/local) closes the facility?
- If the facility is closed for a public health reason (what findings/determination of “safe” are required, by which agency, for determination that facility may be reopened?), the same agency that issued the administrative order, i.e., the public health agency, issues an order rescinding the closure.
 - Example: After anthrax contamination of the Hart Senate Office Building, the building was decontaminated by federal government using EPA's Superfund.
 - The Florida media building where anthrax letters were first discovered was initially closed under criminal investigation, but remained closed for years due to contamination.
 - If two agencies (e.g. police and public health) issue the closure order, the site cannot be reopened until both agencies lift their closure orders
 - Other agencies, such as the federal EPA or local/state environmental protection may also weigh in on a final re-opening decision

Evacuations

- Analogous to closing a facility to prevent public access – ordering that the public evacuate from a facility/area – examples:
 - *Florida Keys as hurricane approaches*
 - *Area around chemical tank car after train crash*
 - *Area around break in chemical plant or pipeline*
 - *Area downstream of dam about to collapse*
- Every state/locality may exercise this fundamental police power to protect public health and safety



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Instructor's Note, State/Local Laws: *Please add state/local specifics when designing a state/local course.*

•Colorado Revised Statutes 24-32-2104(7)(e) and (f)

(5) Direct and compel the evacuation of all or part of the population from any stricken or threatened area within the state if he deems this action necessary for the preservation of life or other disaster mitigation, response, or recovery;

(6) Prescribe routes, modes of transportation, and destinations in connection with evacuation;

(7) Control ingress and egress to and from a disaster area, the movement of persons within the area, and the occupancy of premises therein.

•See also GA Code Ann. §38-3-51(d)(5-7).

Evacuation Example - Colorado

State disaster authorities have specific provisions to order evacuation in “declared” emergencies – Colorado law:

In a (state-) declared emergency, Governor may:
“(e) Direct and compel the evacuation of all or part of the population from any stricken or threatened area within the state if the governor deems this action necessary for the preservation of life or other disaster mitigation, response, or recovery;
“(f) Prescribe routes, modes of transportation, and destinations in connection with evacuation;”



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Instructor’s Note, State/Local Laws: *Instructor should revise this slide with evacuation law in state.*

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- (6) Prescribe routes, modes of transportation, and destinations in connection with evacuation;
- (7) Control ingress and egress to and from a disaster area, the movement of persons within the area, and the occupancy of premises therein.

•The declaration required for this power is a Colorado Governor’s Declaration of Emergency

§24-32-2104(4): A disaster emergency shall be declared by executive order or proclamation of the governor if the governor finds a disaster has occurred or that this occurrence or the threat thereof is imminent. The state of disaster emergency shall continue until the governor finds that the threat of danger has passed or that the disaster has been dealt with to the extent that emergency conditions no longer exist and the governor terminates the state of disaster emergency by executive order or proclamation, but no state of disaster emergency may continue for longer than thirty days unless renewed by the governor. The general assembly, by joint resolution, may terminate a state of disaster emergency at any time. Thereupon, the governor shall issue an executive order or proclamation ending the state of disaster emergency. All executive orders or proclamations issued under this subsection (4) shall indicate the nature of the disaster, the area threatened, and the conditions which have brought it about or which make possible termination of the state of disaster emergency. An executive order or proclamation shall be disseminated promptly by means calculated to bring its contents to the attention of the general public and, unless the circumstances attendant upon the disaster prevent or impede, shall be promptly filed with the division of emergency management, the secretary of state, and the county clerk and recorder and disaster agencies in the area to which it applies.

•See also GA Code Ann. §38-3-51(d)(5-7).

Questions for Evacuation Planning

When ordering an evacuation, the following issues must be considered:

- Will evacuation be mandatory or voluntary?
- If mandatory, how enforced?
- How to protect property in evacuated areas?
- How to precisely identify areas to be evacuated?
- How to ensure mandatory evacuees have priority over voluntary self-evacuees?
- How to provide food, medical care and shelter to the displaced?



Including persons with special needs

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Instructor's Note, State/Local Laws: *Please add state/local specifics when designing a state/local course.*

- Different Jurisdictions have different provisions to answer these questions:
 - Please consult the jurisdiction's Emergency Management & PH Emergency Operations Plans (EOPs) for greater clarity
 - If questions still exist after reviewing the EOPs, please consult a qualified attorney
- Voluntary vs. mandatory evacuations:
 - How firmly should mandatory evacuations be enforced? Door-to-door search?
 - Need for additional personnel?
 - How will the enforcement personnel be protected from the situation that is causing the evacuation?
 - Protecting evacuated property:
 - Looting can be an issue in evacuated areas
- Providing for safety/basic needs of evacuees will depend on nature of evacuation. For example, in New Orleans, some plans call for evacuation to higher floors of substantial structures – which would become 'island' structures (probably without power) after catastrophic flood.

The following are excerpts from Police Guidelines for Evacuations, provided by the Fairfax County, VA Police Department:

- Difficulty in 'targeting' areas to be evacuated
 - Self evacuations from relatively safe areas interfering with evacuation of unsafe areas
- Quarantine Enforcement Guidance from Fairfax, VA PD:
- Governors can by law, compel mandatory evacuation, but it has limits, no matter where you are.
- Considerations: there are no real established procedures, as we have not seen this type of incident yet;
 - Law Enforcement agencies don't seem to want to be tied down by policy that may not give them latitude
 - An incident commander would have to weigh the risks to his personnel vs. forcing someone to leave who does not want to.
 - The officers can go door-to-door and inform the inhabitants that they must leave, but if they refuse there would be little chance physical force would be used to ensure compliance, because:
 - In a compromised environment, the officers may be in Personal Protective Equipment (PPE) suits, and won't have full use of their hands as a result without compromising the integrity of the suit,
 - subject would most likely have a tactical advantage (they're at home, not encumbered by a PPE suit)
 - What would you do with the subject once you forcibly removed them?
 - If subject compromised, you would most likely not be able to place him in a local jail, etc.,
 - If released, subject might sneak back and create even more problems.
 - Subject should be fully informed as to reasons for the evacuation, ordered to leave, provided details to facilitate same, then assisted as much as practicable.
 - Beyond that if they refuse to leave they should be told to shelter in place and their continued presence noted at the incident command.
- Most commanders, when given this type of problem, simply say that they would not physically force someone, nor would they risk the lives and health of their officers to do so.
 - The conventional wisdom is "we will have to adjust and make it up as we go along"; not very comforting, but honest.
 - Law enforcement would be the best short term solution for this, the National Guard would be a better long term solution, while a blending of each after the initial response would be the best scenario for success.

The best you can hope for here is to highlight the probabilities, so as to get them thinking about 'what they would do', and then pray they will never need to apply any of that knowledge.

Evacuation Issues: Re-entry

If evacuation is based on finding that area was unsafe:

- What standard is required to determine area is safe for return?
 - Condition causing evacuation was safely resolved, or
 - Compliant with all appropriate environmental and health standards?
- Who decides?
 - The authority ordering the evacuation?
 - A different government body?



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Examples:

- Hurricane: downed wires removed, transportation available for emergency vehicles
- Infectious disease / contaminated area: when is it safe?
 - If Joint Field Office (JFO) is established, provides access to Emergency Support Functions for biological, chemical, and radiological contamination
 - Senate office building: millions spent to clean single building of anthrax spores spread through the mail.

Standards:

Questions to ask to ensure the scene is safe for re-entry:

- Has the situation originally causing the evacuation been safely resolved?
- Have any other situations arisen to cause the area to remain unsafe?
- If all is as safe as it was pre-evacuation - then **is it** safe enough for re-entry?
- Who decides?
 - The authority who issued the evacuation order
 - Another authority with oversight over the issuing authority
 - E.g. A state environmental agency may have independent authority to keep a facility closed, although it would not necessarily be viewed as a 'higher' body than the FBI, **for instance** (if the original closure was due to a federal crime scene)
- From Former State Health Officer (CO):

“The issuing authority for the evacuation or some entity with greater authority or oversight to the issuing authority would issue the all-clear-it's-safe order... no legal citation for this in Colorado as it is administrative function....there are no standards for safe enough except sometimes there are OSHA or NIOSH or CDC standards or guidelines or recommendations. However, often the situation is unique and the decisions/judgments are improvised after consultation with leading experts.”

State Management Contaminated/Infectious/Dangerous Property

Normal, “non-emergency” state and local powers remain available:

- Adulteration of foodstuffs
- Safety of agricultural products
- Drug safety
- Agricultural control
- Chemicals and toxic substances
- Abatement of nuisances at common law



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These authorities remain in effect for not only managing property, but for all general public health management

Management of Private Property: Impounding Unsafe Foods

- Colorado Example:

“the power. . .to impound any vegetables and other edible crops and meat and animal products intended for and unfit for human consumption, and, upon five days' notice and after affording reasonable opportunity for a hearing to the interested parties, to condemn and destroy the same if deemed necessary for the protection of the public health”



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Instructor's Note, State/Local Laws: *Please add state/local specifics when designing a state/local course. Instructor may revise to reflect the laws of particular state – each state will have corresponding provisions.*

- General Condemnation quotation is from Colorado statute giving towns and cities right of eminent domain for real estate, Colorado C.R.S.A. § 38-6-101.
- Colorado Revised Statutes 25-1.5-102(1)(d): (1) The department has, in addition to all other powers and duties imposed upon it by law, the powers and duties provided in this section as follows: . . . (d) To abate nuisances when necessary for the purpose of eliminating sources of epidemic and communicable diseases affecting the public health.
- Colorado Revised Statutes 24-1.5-104(a): (1) The department has, in addition to all other powers and duties imposed upon it by law, the powers and duties provided in this section as follows:
(a) To impound any vegetables and other edible crops and meat and animal products intended for and unfit for human consumption, and, upon five days' notice and after affording reasonable opportunity for a hearing to the interested parties, to condemn and destroy the same if deemed necessary for the protection of the public health;
- Colorado Revised Statutes 24-32-2104(7) – during an emergency declared by the Governor, (7) In addition to any other powers conferred upon the governor by law, the governor may: (d) Subject to any applicable requirements for compensation under [section 24-32-2111](#), commandeer or utilize any private property if the governor finds this necessary to cope with the disaster emergency...

Federal Powers

- Protection of Food Stuffs
 - FDA : Federal Food, Drug and Cosmetic Act
 - USDA: Federal Meat Inspection Act; Animal Health Act
 - EPA: Federal Insecticide, Fungicide, and Rodenticide Act
 - HHS/CDC: Public Health Service Act
 - DHS: Food and Agricultural Coordinating Council
- Environmental Remediation Laws
 - Superfund powers (CERCLA) for clean-up of contaminated sites
 - Anthrax cleanup from Hart Senate Office Building in 2001 is an example



FDA/ USDA:

• Destruction of 'contaminated' or other property can become controversial – particularly where it is possible to dispute the significance of / impact on public health of the contamination. Economic impact on property owner if property is destroyed may generate extended legal proceedings on appropriateness of a destruction.

• FDA: Condemnation of adulterated Food

• USDA: broad powers to regulate animals and plants, including quarantine and destruction of animals, plants and materials, under the Animal Health Protection Act and the Plant Protection Act, respectively.

Compensation for Impounded Damaged or Destroyed Facilities

- In most epidemic control operations, condemnation of contaminated property (e.g., food) does not result in compensation
- Cooperation of property owner can frequently be obtained, such as well-publicized cases of recalls of:
 - Tylenol
 - Contaminated ground beef
- Bad publicity associated with non-cooperation is a greater commercial liability than is loss of property through voluntary action



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- For states, in most public health epidemic control operations, there is not an issue with takings and compensation, even if food is destroyed, because the owner understands that the publicity associated with non-cooperation is much more of a liability than the loss of property—however, in a terrorist event, where the government seized walkie-talkies or medications, there would need to be some compensation; see Colorado Revised Statutes 24-32-2111.5(4).
- In most public health epidemic control operations, compensation for condemned property, such as food, does not result in compensation:
 - Publicity associated with non-cooperation is more of a liability than the loss of property
 - Example: contaminated or epidemiologically implicated food has no value
- Government takings of intact equipment or supplies in a terrorist incident would require compensation:
 - Radio or communications equipment
 - Medications, vaccines, or medical supplies and equipment
 - See Colorado Revised Statutes 24-32-2111.5(4)

Objective 4.2

Identify Legal Options Available to Use Private Facilities in Emergencies



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Knowing what the Government's responsibilities are when it takes control

Emergency Use of Private Facilities: Legal Powers

- Legal authorities empower government to use property in an emergency
 - Permit action where cannot negotiate use of private property
 - Provide leverage in negotiations
- Exercise of these powers should be avoided if possible
 - Litigation rarely the best way to resolve issues of compensation, depreciation, cost allocation, etc.
 - Example: Pipeline right of way acquisition – over 70% by agreement



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Source of Pipeline right of way statistic – Right of Way Attorney for El Paso Corporation's natural gas pipelines, February 2005.

Emergency Use of Private Facilities: Controlling Vs. Operating Facilities

- Taking over facilities for use rarely meets needs
- Control of a health care facility will not necessarily result in successful operation of the facility -- personnel are also needed
- It is more likely that government will direct patients to cooperating facilities or establish a temporary facility for the specific issue at hand



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• Authorities to control a health care facility will not necessarily allow operation of the facility – also need personnel. States generally have not assumed control of a health care facility except in special circumstances related to closure of nursing homes.

• States have on occasion closed certain parts of certain hospitals, e.g., cardiac catheterization laboratory, ICU. What appears more likely than actual ‘commandeering’ of a hospital is that the government would direct traffic, e.g., designate a certain hospital as the SARS hospital or the smallpox hospital or send radiation exposure cases to a particular facility, or the government might establish a temporary facility for caring for influenza patients, rather than having them go to the nearest hospital.

Note: Georgia law seeks to address this problem by explicitly stating that as a condition to receiving license to operate as a hospital, the hospital agrees that it can be required to “transfer management and supervision” to the government during a public health emergency. This statute is provided as a specific example in slide 30.

Emergency Use of Private Facilities: Availability of Temporary Facilities

An alternative to using existing facilities:

- Explore temporary facilities available from NDMS, SNS, contractors or Defense Department
 - E.g., Mobile field hospitals
- Explore temporary facilities with cooperating partners



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•Examples of temporary facilities with cooperating partners:

- Setting up a mass vaccination facility in the gym of a private school or the ballroom of a hotel
- Setting up a temporary treatment facility in a private convention center
- FEMA has Volunteer Agency Liaisons in each region to assist with volunteer coordination planning, for identification and coordination of facilities/property that can be supplied by volunteer agencies.

Emergency Use of Private Facilities State Law Acquisition Power- Colorado Example

For general condemnation:

- *“to build, acquire, construct, or establish any public building or any other public work or public improvement . . . by right of eminent domain such private property as may be required...”*

Power to take control of facility in declared emergencies:

- *“Subject to any applicable requirements for compensation . . . commandeer or utilize any private property if the governor finds this necessary to cope with the disaster emergency”*



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•C.R.S.A. 25-1.5-102(1)(d): (1) The department has, in addition to all other powers and duties imposed upon it by law, the powers and duties provided in this section as follows: . . . (d) To abate nuisances when necessary for the purpose of eliminating sources of epidemic and communicable diseases affecting the public health.

•C.R.S.A. 24-1.5-104(a): (1) The department has, in addition to all other powers and duties imposed upon it by law, the powers and duties provided in this section as follows: (a) To impound any vegetables and other edible crops and meat and animal products intended for and unfit for human consumption, and, upon five days' notice and after affording reasonable opportunity for a hearing to the interested parties, to condemn and destroy the same if deemed necessary for the protection of the public health;

•C.R.S.A. 24-32-2104(7) – during an emergency declared by the Governor, (7) In addition to any other powers conferred upon the governor by law, the governor may: (d) Subject to any applicable requirements for compensation under [section 24-32-2111](#), commandeer or utilize any private property if the governor finds this necessary to cope with the disaster emergency...

•C.R.S.A. 8-6-101: Whenever, in a town, city, or city and county, the council thereof or other municipal board having authority by charter or statute passes a resolution or ordinance to establish, construct, extend, open, widen, or alter any street, lane, avenue, boulevard, park, playground, parkway, pleasure way, public square, market, viaduct, bridge, sewer, tunnel, or subway or to build, acquire, construct, or establish any public building or any other public work or public improvement, said town, city, or city and county shall have the right to take, damage, condemn, or appropriate by right of eminent domain such private property as may be required in the manner provided for in this part 1; but, except as specifically authorized by law, no incorporated town shall exercise the power of eminent domain over property outside the town boundaries. In any case where such special benefits are not to be assessed by commissioners as provided in section 38-6-107 against the real estate specially benefited, the said town, city, or city and county may follow the procedure set forth in this part 1 or the procedure set forth in article 1 of this title.

Emergency Use of Health Care Facilities: Georgia Example

Some states have specific provisions covering use of health care facilities in emergencies.

- Governor may “Compel a health care facility to provide services or the use of its facility if such services or use are reasonable and necessary for emergency response”
- “The use of such health care facility may include transferring the management and supervision of the health care facility to the Department of Human Resources for a limited or unlimited period of time not extending beyond the termination of the public health emergency”



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Instructor's Note, State/Local Laws: Please add state/local specifics when designing a state/local course. Instructor may revise to reflect the laws of particular state – each state will have corresponding provisions.

Georgia provision exactly follows the suggested language of Section 502 Of the Model State Emergency Health Powers Act. Ga. Code Ann., § 38-3-51(d)(4.1)

Ga. Code Ann., § 38-3-51 below

Title 38. Military, Emergency Management, and Veterans Affairs

Chapter 3. Emergency Management ([Refs & Annos](#))

[Article 3.](#) Emergency Powers

[Part 1.](#) Governor

§ 38-3-51. Emergency Powers of Governor

(a) In the event of actual or impending emergency or disaster of natural or human origin, or impending or actual enemy attack, or a public health emergency, within or affecting this state or against the United States, the Governor may declare that a state of emergency or disaster exists. As a condition precedent to declaring that a state of emergency or disaster exists as a result of a public health emergency, the Governor shall issue a call for a special session of the General Assembly pursuant to [Article V, Section II, Paragraph VII of the Constitution of Georgia](#), which session shall convene at 8:00 A.M. on the second day following the date of such declaration for the purpose of concurring with or terminating the public health emergency. The state of emergency or disaster shall continue until the Governor finds that the threat or danger has passed or the emergency or disaster has been dealt with, to the extent that emergency or disaster conditions no longer exist, and terminates the state of emergency or disaster. No state of emergency or disaster may continue for longer than 30 days unless renewed by the Governor. The General Assembly by concurrent resolution may terminate a state of emergency or disaster at any time. Thereupon, the Governor shall by appropriate action end the state of emergency or disaster.

(b) A declaration of a state of emergency or disaster shall activate the emergency and disaster response and recovery aspects of the state and local emergency or disaster plans applicable to the political subdivision or area in question and shall be authority for the deployment and use of any forces to which the plan or plans apply and for use or distribution of any supplies, equipment, and materials and facilities assembled, stockpiled, or arranged to be made available pursuant to Articles 1 through 3 of this chapter or any other law relating to emergencies or disasters.

(c) The Governor shall have and may exercise for such period as the state of emergency or disaster exists or continues the following additional emergency powers:

(1) To enforce all laws, rules, and regulations relating to emergency management and to assume direct operational control of all civil forces and helpers in the state;

(2) To seize, take for temporary use, or condemn property for the protection of the public in accordance with condemnation proceedings as provided by law;

(3) To sell, lend, give, or distribute all or any such property among the inhabitants of the state and to account to the proper agency for any funds received for the property; and

(4) To perform and exercise such other functions, powers, and duties as may be deemed necessary to promote and secure the safety and protection of the civilian population.

Emergency Use of Personal Property Georgia Example

Georgia law covers any materials required during an emergency

“The Governor may...(4) Commandeer or utilize any private property if he finds this necessary to cope with the emergency or disaster”



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Instructor’s Note, State/Local Laws: *Please add state/local specifics when designing a state/local course. Instructor should revise to reflect the authority in a particular state to take possession of and use private property or materials in an emergency.*

As noted earlier, the existence of a broad power to commandeer property does not reduce the importance of seeking to negotiate / obtain use of property. In emergencies, most property owners will seek to cooperate – and perhaps even volunteer some resources. Economic issues – difficulty in estimating the cost of materials, or concern about preexisting contractual commitments or liability may reduce cooperation. But note that if property is “commandeered” – the government will be responsible for the cost incurred.

Ga. Code Ann., § 38-3-51 (*continued from previous slide’s notes*)

(d) In addition to any other emergency powers conferred upon the Governor by law, he may:

- (1) Suspend any regulatory statute prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency, if strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency or disaster;
- (2) Utilize all available resources of the state government and of each political subdivision of the state as reasonably necessary to cope with the emergency or disaster;
- (3) Transfer the direction, personnel, or functions of state departments and agencies or units thereof for the purpose of performing or facilitating emergency services;
- (4) Commandeer or utilize any private property if he finds this necessary to cope with the emergency or disaster;
 - (4.1) Compel a health care facility to provide services or the use of its facility if such services or use are reasonable and necessary for emergency response. The use of such health care facility may include transferring the management and supervision of the health care facility to the Department of Human Resources for a limited or unlimited period of time not extending beyond the termination of the public health emergency;
- (5) Direct and compel the evacuation of all or part of the population from any stricken or threatened area within the state if he deems this action necessary for the preservation of life or other disaster mitigation, response, or recovery;
- (6) Prescribe routes, modes of transportation, and destinations in connection with evacuation;
- (7) Control ingress and egress to and from a disaster area, the movement of persons within the area, and the occupancy of premises therein;
- (8) Suspend or limit the sale, dispensing, or transportation of alcoholic beverages, firearms, explosives, and combustibles; provided, however, that any limitation on firearms under this Code section shall not include an individual firearm owned by a private citizen which was legal and owned by that citizen prior to the declaration of state of emergency or disaster or thereafter acquired in compliance with all applicable laws of this state and the United States; and
- (9) Make provision for the availability and use of temporary emergency housing.

(e) When the available funds are not sufficient for the purpose of paying the expenses incident to carrying out the provisions authorized by Articles 1 through 3 of this chapter, the Governor may transfer from any available fund in the state treasury such sum as may be necessary to meet the emergency or disaster; and the moneys so transferred shall be repaid to the fund from which transferred when moneys become available for that purpose by legislative appropriation or otherwise.

(f) In the event that the Governor proclaims an emergency or disaster, as defined by Articles 1 through 3 of this chapter, to be a catastrophe within the meaning of Article III, Section IX, Paragraph VI(b) of the Constitution of the state, the funds referred to in the paragraph may be utilized by the Governor for the purpose of carrying out the provisions authorized by Articles 1 through 3 of this chapter. (*There is more text of this law in the electronic version of this slide’s notes*)

(g) In the event that the Governor proclaims an emergency or disaster, as defined in Articles 1 through 3 of this chapter, the Governor may provide welfare benefits to the citizens of this state in the form of grants to meet disaster-related necessary expenses or serious needs of

Emergency Use of Private Facilities: Government Roles

- In situations of mass trauma, illness or prophylaxis, government role could include:
 - Designating existing facilities for alternative functions
 - Identifying/supplying new, temporary facilities using outside, emergency supplies and staff
 - Identifying and certifying volunteer staff, e.g., nurses and doctors
 - Suspending selected existing regulations
- Could require executive orders by Governor or other emergency powers



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In foreseeable situations involving mass trauma or illness or mass prophylaxis, government's role would be:

- Designating existing facilities for alternative functions, for instance:
 - Hospitals, e.g., treatment of smallpox or influenza
 - Schools, e.g., operating smallpox vaccination clinics
 - Hotels or apartments, e.g., operating quarantine sites outside the home
- Identifying and supplying new, temporary facilities using outside, emergency supplies and staff
- Identifying and certifying volunteer staff, e.g. nurses and doctors
- Suspension of selected existing regulations

Such actions would require executive orders from the Governor or other emergency powers.

Objective 4.3

**Understand Key Legal Issues
Regarding Control of Supplies
and Equipment**



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Management of Private Property

Key Issues: Federal Powers

All subject to 5th Amendment: “nor shall private property be taken for public use, without just compensation”

- General Condemnation– requires filing civil action in Federal Court
- Condemnation under Stafford Act Title VI:
 - *“Procure by condemnation or otherwise”*
 - *“For emergency preparedness”*
 - *“With right to take immediate possession thereof”*

Note: This provision is rarely used



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•General Condemnation – See 40 U.S.C. 3113. Process requires attorney general to commence proceedings within 30 days of receipt of request from authorized government official. 40 U.S.C. 3114 specifies procedures to be followed when government will occupy real estate before conclusion of condemnation proceedings.

•Although the federal government did not exercise federal eminent domain power until the 1870s – preferring instead to acquire property in state eminent domain proceedings, the Supreme Court unequivocally held in 1875 that it had this power. [Kohl v. United States, 91 U.S. 367, 372-73 \(1875\)](#). See Adam Grace, *From the Lighthouses: How the First Federal Internal Improvement Projects Created Precedent That Broadened the Commerce Clause, Shrunk the Takings Clause, and Affected Early Nineteenth Century Constitutional Debate*, 68 Albany Law Rev. 97 (2004).

•Condemnation under Stafford Act Title VI

•Stafford Act condemnation provision was originally enacted in the Civil Defense Act of 1950; the Civil Defense Act was repealed in 1993 and its principal provisions were re-enacted in the new Stafford Act Title VI.

•The definition of emergency preparedness in the Stafford Act is exceptionally broad: “all those activities and measures designed or undertaken to prepare for or minimize the effects of a hazard on the civilian population”, including preparedness for, response to, and recovery from a hazard. 42 U.S.C. 5195a(3).

Management of Private Facilities

Key Issues: Other Federal Powers:

Defense Production Act (DPA):

- Government can require private companies to execute “priority” contracts for materials, services & facilities
- May redirect/reallocate medical supplies, equipment and pharmaceuticals held in private sector
 - Even where subject to existing contractual commitments
- Requires findings that the contract is “necessary for the national defense, including ‘emergency preparedness’”

Rarely used historically, other than DoD contracting



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- The DPA is a powerful authority that has not previously been used for Public Health Emergency Management purposes
- The use of the DPA without consent of the contracting party is frequently controversial
- Defense Production Act priority contracting provisions are found at 50 U.S.C. 2071 et seq. Current delegation of these powers is found in Executive Order 12919.
- DPA 2071: Allocation of materials, services, and facilities The President is authorized (1) to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and, for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance, and (2) to allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.
- By cross reference, DPA’s definition of national defense includes Stafford Act “emergency preparedness”
- DPA was amended in 2003 to add “critical infrastructure protection and restoration” to the definition of “national defense” (Defense Production Reauthorization Act of 2003, Pub.L 108-195, December 19, 2003.) Congress defined “critical infrastructures” as “any systems and assets, whether physical or cyber-based, so vital to the United States that the degradation or destruction of such systems and assets would have a debilitating impact on national security, including, but not limited to, national economic security and national public health or safety.” DPA § 702(2), 50 U.S.C. App. 2152(2). This definition appears clearly to include the medical sector.
- BioShield Act of 2004 – has a limited provision that authorizes federal government to use a biocontainment laboratory that was given federal funds for biomedical countermeasure research.

(4) Availability of **Facilities** to the Secretary.--In any grant, contract, or cooperative agreement entered into under the authority provided in this section with respect to a biocontainment laboratory or other related or ancillary specialized research **facility** that the Secretary determines necessary for the purpose of performing, administering, or supporting qualified countermeasure research and development, the Secretary may provide that the **facility** that is the object of such grant, contract, or cooperative agreement shall be available as needed to the Secretary to respond to public health emergencies affecting national security.

Emergency Re-allocation of Resources Federal Powers

- CDC traditionally **requests** re-allocation of resources such as vaccines, medications, ventilators to protect public health across the country
 - Voluntary re-routing of flu vaccine in Fall 2004
- HHS also can reallocate *government-owned* supplies such as:
 - Vaccines
 - Strategic National Stockpile (SNS)



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Ability to ration/re-allocate resources (e.g., vaccines, drugs, ventilators):

- Broad legal authorities / state and federal—reallocation is quite different from providing additional new supplies;
- There is little to no experience with the government seizing private property and re-allocating it, e.g., privately distributed influenza vaccine in Fall of 2004;
- Generally, the government can re-allocate its own supplies; the legal powers to seize property may exist but practicalities do not allow for it and there could be numerous court challenges.
- It may also depend on whether an emergency has been declared (not the case with the flu vaccine in 2004).
- In Colorado Revised Statute 24-32-2111.5(2), immunity is offered for compliance with executive orders, so there could be an Executive Order requiring providers to give up their vaccine or antiviral medications or ventilators.

Emergency Reallocation of Resources State Powers

All states have powers to reallocate resources in emergencies. Key differences involve:

- Is an emergency declaration needed?
- Are executive orders by the Governor required?
- Are provisions required for alternate, new supplies from the manufacturer or suppliers?
- How does the government identify the location of such supplies?



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Instructor's Note, State/Local Laws: *Instructor may substitute slide with information from particular state.*

- Different powers will apply to different parts of the chain of ownership, and may also affect how the cost of an action is paid for, government purchases vs. allocations
- In 2004 vaccine shortage, CDC requested voluntary re-routing of vaccines from private purchasers
- D.C. fined MDs who give 2004 flu vaccine to unauthorized personnel:
 - Several states issued similar administrative public health orders,
 - But the Colorado Board of Health did not, reasoning that it would be a direct intervention of government into medical practice, and would send the signal that doctors are the culprits, when the real problem was with the vaccine manufacturer,
 - Finally, it would be difficult for a public health agency to enforce, and it might undermine cooperation and volunteerism between providers and the government needed in the future.
- How can cooperation with and compliance from providers be obtained?
 - Colorado Law provides for offering incentives, such as immunity and indemnification –see Colorado Revised Statutes 24-32-2111.5(2)

Ability to Use Non-Licensed Pharmaceuticals Federal Powers

Federal government has power to obtain emergency resources not normally available

- FDA may approve pharmaceutical for use as an *Emergency Use Investigational New Drug (IND)*
- IND may be domestic drugs awaiting approval
- IND may be an imported pharmaceutical similar to a domestic pharmaceutical
- Use of IND requires informed, written consent of patient



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Instructor's Note/Optional Slide: *This slide may be considered optional for state/local courses, at the discretion of the instructor.*

Sources: http://www.fda.gov/cder/regulatory/applications/ind_page_1.htm and www.fda.gov/cber/rules/emerguseind.pdf

Emergency Use of Investigational New Drug (IND): Allows the FDA to authorize use of an experimental drug in an emergency situation that does not allow time for submission of an IND in accordance with 21 C.F.R. , [Sec. 312.23](#) or [Sec. 312.34](#). It is also used for patients who do not meet the criteria of an existing study protocol, or if an approved study protocol does not exist.

•Ability to import/utilize non-approved drugs/sources:

- Rapid Approvals—currently occurring with IND protocols rather than rapid approvals—this means that dispensing the medication requires a rather elaborate consent process, which can slow down processing patients at a mass clinic
- Utilize with consent and follow-up

New Drug Licensing Option: Federal Waiver

Bioshield Act of 2004

- In emergencies involving bio/chem/ radiological agents (military, domestic, and/or public health)
- HHS Secretary can authorize “emergency use” of otherwise unapproved drug, device, or biological product
 - After consultation with CDC and NIH
 - Determination of effectiveness/balancing benefits and risks
 - Secretary can impose conditions on emergency use
 - Provisions for labeling/communication



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Instructor's Note/Optional Slide: *This slide may be considered optional for state/local courses, at the discretion of the instructor.*

•BioShield Act of 2004: PL 108-276, 2004 S 15. The provision summarized in the slide is codified at 21 U.S.C.A. § 360bbb-3.

(a) IN GENERAL.--

(1) EMERGENCY USES.--Notwithstanding sections 505, 510(k), and 515 of this Act and section 351 of the Public Health Service Act, and subject to the provisions of this section, the Secretary may authorize the introduction into interstate commerce, during the effective period of a declaration under subsection (b), of a drug, device, or biological product intended for use in an actual or potential emergency (referred to in this section as an 'emergency use').

(2) APPROVAL STATUS OF PRODUCT.--An authorization under paragraph (1) may authorize an emergency use of a product that--

(A) is not approved, licensed, or cleared for commercial distribution under a provision of law referred to in such paragraph (referred to in this section as an 'unapproved product'); or

(B) is approved, licensed, or cleared under such a provision, but which use is not under such provision an approved, licensed, or cleared use of the product (referred to in this section as an 'unapproved use of an approved product').

(3) RELATION TO OTHER USES.--An emergency use authorized under paragraph (1) for a product is in addition to any other use that is authorized for the product under a provision of law referred to in such paragraph.

(c) CRITERIA FOR ISSUANCE OF AUTHORIZATION.--The Secretary may issue an authorization under this section with respect to the emergency use of a product only if, after consultation with the Director of the National Institutes of Health and the Director of the Centers for Disease Control and Prevention (to the extent feasible and appropriate given the circumstances of the emergency involved), the Secretary concludes--

(1) that an agent specified in a declaration under subsection (b) can cause a serious or life-threatening disease or condition;

(2) that, based on the totality of scientific evidence available to the Secretary, including data from adequate and well-controlled clinical trials, if available, it is reasonable to believe that--

(A) the product may be effective in diagnosing, treating, or preventing--

(i) such disease or condition; or

(ii) a serious or life-threatening disease or condition caused by a product authorized under this section, approved or cleared under this Act, or licensed under section 351 of the Public Health Service Act, for diagnosing, treating, or preventing such a disease or condition caused by such an agent; and

(B) the known and potential benefits of the product, when used to diagnose, prevent, or treat such disease or condition, outweigh the known and potential risks of the product;

(3) that there is no adequate, approved, and available alternative to the product for diagnosing, preventing, or treating such disease or condition; and

(4) that such other criteria as the Secretary may by regulation prescribe are satisfied.

Key Takeaways - Summary

- Each level of government has general powers to deny access to or take control of virtually any facility or property if such action is necessary to protect the public health
- Cooperation of and agreement with property owners is far superior to exercising emergency powers



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- Cooperation of and agreement with property owners is far superior to coercive use of emergency powers
 - Depending on access control vs. use issues, compensation may be payable for 'commandeered' facilities and property
- Jurisdictions should become familiar with the location of resources, and create the forms of agreements or court filings necessary to use these resources in an emergency, *before* an emergency arises.

Hypothetical Example (Cont.) Still Need Personnel

Up until now:

- Arrangements were made to establish several medical treatment facilities and drug distribution centers – in armories, schools, and a tent city
- Equipment and drugs have been requisitioned and are being delivered

BUT

- Most local public health and medical personnel are already either:
 - Treating patients in pre-existing hospitals & clinics, or
 - Sick themselves and unable to report



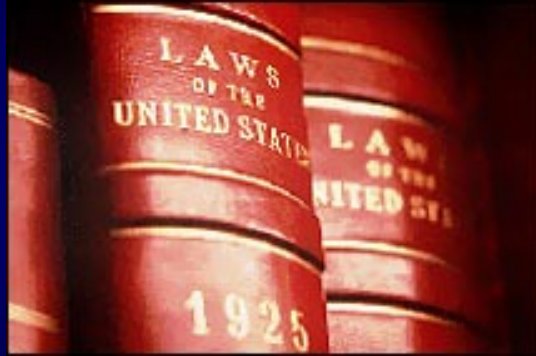
Next Segment

What are the legal considerations regarding the identification of and access to professional resources during public health emergencies?



End: Unit 4

For additional
information on
public health law
visit the *CDC
Public Health
Law Program*



www.cdc.gov/phlp

